PUBLIC PROSECUTOR

v.

ZAINUDDIN ABDUL RAOF & ANOR.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CRIMINAL TRIAL NO. 47-13-91]
16 JULY 1992

CRIMINAL PROCEDURE: *Dangerous Drugs - Trafficking in cannabis - Cannabis found in glove compartment of van - No overt act which showed joint concert - Identification by plain clothes policemen not clear cut - Mistaken to be repossessors.*

EVIDENCE: *Corroborative evidence - Accused's van borrowed for use in general elections - List of voters in glove compartment - Totality of evidence raises reasonable doubt that accused had custody and control of cannabis.*

The amended charge against the 1st accused was that he trafficked in 220.7 grammes of cannabis. The charge was amended after the 2nd accused who had earlier been charged for trafficking in the cannabis in joint concert with the 1st accused was acquitted.

The package of cannabis was found in the glove compartment of the van owned and driven by the 1st accused, who was accompanied by the 2nd accused when the van was overtaken and stopped by a party of three plain clothes policemen, who then arrested them.

There were contradictions in the testimony of PW5 and one Inspector Rotzarn as to which of them had identified themselves as the police to the 1st accused whilst instructing him to stop the van.

The 1st accused said in his evidence that he neither heard the police identify themselves nor saw any authority card which PW5 said he showed, as the glass panel on his van's side window was almost closed and he thought the persons in the vehicle which overtook his van were repossessors. He added that when they were arrested he was driving to his next job.

There was evidence that the 1st accused had lent his van to one Hassan bin Aroff four days prior to the arrest to transport voters during the general elections and that the van was used by many persons for various purposes. A list of names of voters was found in the glove compartment together with the package of cannabis. The van which could not be locked, had been returned to the 1st accused only on the day of his arrest.

Two days before his arrest the accused had been at work driving his lorry between Kuala Lumpur and Kedah and he had returned to Kedah on the morning before his arrest.

Held:

[1] As there was no evidence adduced that the 2nd accused, in joint concert with the 1st accused, had trafficked the drugs, he was discharged and acquitted.

[2] The evidence relating to identification by PW5 was hesitant and not clear cut.

[3] The evidence of the 1st accused and the discovery of a list of names of voters in the glove compartment together with the package of cannabis supported his testimony that the van was borrowed for use during the elections and it was not in his possession when he was driving his lorry to and from Kuala Lumpur during that period.

[4] The totality of the evidence raised a reasonable doubt on an essentially weak *prima facie* case for the prosecution that the 1st accused had custody and control of the cannabis.

[Both accused acquitted and discharged.]

Legislation referred to:
Dangerous Drugs Act 1952, s. 2

For the public prosecutor - Jamal Mohamad, DPP
For the 1st accused - Ahmad Farid; M/s. Ahmad Farid & Associates
For the 2nd accused - C. Shanmugaiah; M/s. C. Shanmugaiah & Co.

JUDGMENT

KC Vohrah J:

The amended charge against the accused Zainuddin bin Abdul Raof is that he trafficked in 220.7 grammes of cannabis on 5 August 1986 in the vicinity of Pasar Borong, Jalan Putra, Alor Setar. The charge against him was amended after I had acquitted Nordin bin Ahmad who had earlier been charged for trafficking in the cannabis in joint concert with Zainuddin.

The evidence against the accused, Zainuddin, is that he is the owner of a van which the police seized on 5 August 1986. It was adduced in evidence that on the date at about 12.15 p.m. a police party of 3 in plain clothes in a car followed the van from a petrol station along the Kangar - Alor Setar road into Jalan Gangsa where the van had gone into after a junction. The evidence was also that about 100 metres from the traffic lights the police car driven by Inspector Rotzarn overtook the van. Inspector Rotzarn stated that he instructed DPC Subandi to signal the van to stop and he said DPC Subandi (PW5) identified himself as the police and asked the driver of the van to stop. DPC Subandi however said it was Inspector Rotzarn who identified himself as the police though after further questioning by the Deputy Public Prosecutor, he said, with some hesitation, that it was Inspector Rotzarn and himself who told the driver they were the police. Subandi said that he showed his authority card although no mention of this was made by Inspector Rotzarn. The evidence was clear that Inspector Rotzarn overtook the car and the van stopped behind it. Then the driver of the van reversed the van into a lane. The driver (Zainuddin) and the passenger (Nordin) of the van came out and they were then arrested.

The police took both Zainuddin and Nordin in the van to police headquarters and an inspection of the van was made by Inspector Rotzarn. A plastic package was found in the glove compartment of the van. It held 5 bundles inside a brown paper wrapping and there were 250 rolls of dried plant material in the bundles. These were identified by the Government Chemist PW10 in the case as containing 220.7 grammes of cannabis. I accepted the evidence of the chemist that the plant material was cannabis within the meaning of s. 2 of the Dangerous Drugs Act 1952.

As stated earlier at the close of the prosecution's case I had acquitted the second accused, Nordin bin Ahmad who was the passenger in the van. There was no evidence which connected him with the bundle of cannabis and there was no overt act adduced in evidence which showed there was joint concert between him and the 1st accused Zainuddin in regard to the offence of trafficking in cannabis.

Zainuddin elected to give evidence on oath. His defence was that he knew nothing about the bundle. He said he did not hear the police identify themselves as the glass panel on his side window was almost closed and he had thought the persons in the vehicle which overtook his van were persons who were wanting to repossess his van because of some arrears in the instalment payments on the van. He said that that was why he reversed the van.

He adduced evidence which was not shaken, and in fact it was corroborated by the evidence of one Hassan bin Aroff, and it showed that he had lent his van 4 days before the incident, on 2 August 1986, to Hassan who had told him that he required the van to transport voters during the general elections on 3 July 1986. Hassan said that in fact the van was used by many persons for various purposes, to carry voters, for bringing food for party workers, for use to put up and then remove posters. Hassan said that he returned the van on 5 August 1986, that is the date the accused was arrested, a fact corroborated by the evidence of Zainuddin's uncle.

The accused's evidence was that on 3 August 1986 he drove a lorry laden with rice from a rice mill near Sungei Petani for delivery in Kuala Lumpur. He and his co-driver arrived in Kuala Lumpur at dawn and delivered the rice after which he picked fertiliser at the North Port, Klang for delivery to Batu Perkaka Estate in Kuala Ketil, Kedah. He said he arrived in the estate in the morning of 5 August 1986 where the fertiliser was unloaded. Then he and his co-driver left for Alor Setar for Syarikat Enterprise Melayu Utara.

He said his co-driver had told him, after he had made a call to Alor Setar, that they had to drive the lorry for another delivery. They arrived at the office Syarikat Enterprise Melayu Utara and he was informed of this other job in the afternoon. He took a taxi home, bathed and when he was having lunch Nordin come to see him to borrow his van. Zainuddin then drove the van towards Syarikat Enterprise Melayu Utara situated near the place where he was arrested. It was for the purpose of his next job. He then saw a car driven very fast overtaking him and cutting across his path. He was smoking and had his glass slightly open. He said he did not hear the police identify themselves nor see any authority card which PW5 said he showed. The accused said he feared his van would be repossessed and that was why he reversed his van into a lane in order to escape until he realised it was the police.

The evidence of the accused was unshaken under cross-examination. The evidence of his uncle and of Hassan too was not shaken. As regards the borrowing of the van by Hassan on 2 August 1986 for the elections, and that it was returned on 5 August 1986 the evidence was believable and the discovery of a list of names of voters in the glove compartment together with the package of cannabis indeed does lend credence to the story that the van was borrowed for use during the election and was not in the possession of the accused while he was driving his lorry to and from Kuala Lumpur during that period.

The story of Hassan was that many persons used the van. Could not anyone of the persons have left the package in the glove compartment and had forgotten to take it back? It was relatively a small package and could have been forgotten. Hassan had also stated and this was not challenged that the van could not be locked and that when he returned the van it was not locked.

As for his story that he thought the men in the overtaking car were persons who were intending to repossess his van it is not an outlandish assertion. The police were not in uniform. The car they were in was driven fast and had cut across the van's path. His story that he could not hear the police nor see the authority card and the fact that the overtaking car was driven fast and the glass panel on his window was slightly down may plausibly explain his not hearing or seeing the policemen. In any event the evidence relating to the identification by Subandi was hesitant and not clear cut and the prosecution evidence did not show that the accused's attention had been attracted by Subandi's identification.

Considering the totality of the evidence my view is that the defence of the accused has raised a reasonable doubt on an essentially weak *prima facie* case for the prosecution that he had custody and control of the cannabis. I therefore acquit and discharge him.

The package of cannabis (P7, P5, P6) and the van and key (P8 and P13) are forfeited. Rest to police for disposal.

Also found in [1992] 4 CLJ 2050